



3410-02 P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1218

[Document Number AMS-FV-12-0062]

Blueberry Promotion, Research and Information Order; Assessment Rate Increase

AGENCY: Agricultural Marketing Service.

ACTION: Final rule.

SUMMARY: This rule amends the Blueberry Promotion, Research and Information Order (Order) to increase the assessment rate from \$12 to \$18 per ton (an increase of \$0.003 per pound). The Order is administered by the U.S. Highbush Blueberry Council (USHBC) with oversight by the U.S. Department of Agriculture (USDA). Under the program, assessments are collected from domestic producers and importers and used for research and promotion projects designed to maintain and expand the market for highbush blueberries in the United States and abroad. Additional funds will allow the USHBC to expand its health research activities and promotional efforts. The USHBC uses its health information in its promotion messaging to help build demand for blueberries. Increasing demand will help move the growing supply of blueberries, which will benefit producers and consumers.

EFFECTIVE DATE: January 1, 2014.

FOR FURTHER INFORMATION CONTACT: Maureen T. Pello, Marketing Specialist, Research and Promotion Division, Fruit and Vegetable Program, AMS, USDA, P.O. Box 831, Beavercreek, Oregon, 97004; telephone: (503) 632-8848; facsimile (503) 632-8852; or electronic mail: Maureen.Pello@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under the Order (7 CFR part 1218). The Order is authorized under the Commodity Promotion, Research, and Information Act of 1996 (1996 Act) (7 U.S.C. 7411-7425).

Executive Order 12866

The Office of Management and Budget (OMB) has waived the review process required by Executive Order 12866 for this action.

Executive Order 13175

This action has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive

effect. Section 524 of the 1996 Act (7 U.S.C. 7423) provides that it shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Under section 519 of the 1996 Act (7 U.S.C. 7418), a person subject to an order may file a written petition with USDA stating that an order, any provision of an order, or any obligation imposed in connection with an order, is not established in accordance with the law, and request a modification of an order or an exemption from an order. Any petition filed challenging an order, any provision of an order, or any obligation imposed in connection with an order, shall be filed within two years after the effective date of an order, provision, or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling on the petition. The 1996 Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of USDA's final ruling.

Background

This rule amends the Order to increase the assessment rate from \$12 to \$18 per ton (an increase of \$0.003 per pound). The Order is administered by the USHBC with oversight by USDA. Under the program, assessments are collected from domestic producers and importers and used for research and promotion projects designed to maintain and expand the market for highbush blueberries in the United States and abroad. Additional funds will enable the USHBC to expand its health research activities and promotional efforts. The USHBC uses its health information in its promotion messaging to help build demand for blueberries. Increasing demand will help move the growing supply of blueberries, which will benefit producers and consumers. This action was unanimously recommended by the USHBC.

The Order specifies that the funds to cover the USHBC's expenses shall be paid from assessments on producers and importers, donations from persons not subject to assessments and from other funds available to the USHBC. First handlers are responsible for collecting and submitting reports and producer assessments to the USHBC. Handlers must also maintain records necessary to verify their reports. Importers are responsible for paying assessments to the USHBC on highbush blueberries imported into the United States through U.S. Customs and Border Protection (Customs). The Order also provides for two

exemptions. Producers and importers who produce or import less than 2,000 pounds of blueberries annually, and producers and importers of 100 percent organic blueberries are exempt from the payment of assessments.

Section 1218.52(c) of the Order specifies that assessments shall be levied at a rate of \$12 per ton on all highbush blueberries. The assessment rate may be modified with the approval of the Secretary.

The \$12 per ton assessment rate has been in effect since the Order's inception in 2000. The USHBC's fiscal year runs from January 1 through December 31. USHBC expenditures have ranged from \$1,522,519 in 2004 to \$3,931,296 in 2012. Expenditures for health and nutrition research have ranged from \$113,880 in 2004 (7.5 percent of total expenses) to \$668,059 in 2011/2012 (17.0 percent of total expenses).

USHBC expenditures for health messaging and promotion activities have ranged from \$920,020 in 2004 (60.4 percent of total expenses) to \$2,820,817 in 2012 (71.8 percent of total expenses). Pursuant to section 1218.50(i) of the Order, administrative expenditures have been under 15 percent of total expenses annually.

USHBC assessment income has ranged from \$1,435,989 in 2004 (\$1,080,230 in domestic assessments and \$355,759 in import

assessments) to \$4,051,836 in 2012 (\$2,434,646 in domestic assessments and \$1,601,966 in import assessments).

Additionally, pursuant to section 1218.50(j) of the Order, the USHBC maintains a monetary reserve with funds that do not exceed one fiscal period's budget.

USHBC 2012 Recommendation

The USHBC met on October 5, 2012, and unanimously recommended increasing its assessment rate from \$12 to \$18 per ton (\$0.006 to \$0.009 per pound). This equates to an increase of \$6 per ton, or \$0.003 per pound. Additional funds would enable the USHBC to expand its health research activities and promotional efforts. Since the program's inception, the USHBC has funded several health and nutrition research projects, many of them laboratory studies. USHBC research has shown possibilities relating to various health issues, including cardiovascular health and cancer. However, most of these preliminary findings have been done under laboratory conditions. Additional funds will allow the USHBC to incorporate specific areas of research into expanded clinical (human) trials. Clinical trials are important for the industry to be able to make health claims according to the Federal Trade Commission (FTC) and the Food and Drug Administration (FDA) requirements for the advertising of food.

The USHBC uses its health information in its promotion messaging to help build demand for blueberries. Increasing demand will help move the growing supply of blueberries. Worldwide highbush blueberry production has grown from 393 million pounds in 2005 to 753 million pounds in 2010. Production is expected to increase to 1 billion pounds in 2013 and to nearly 1.4 billion pounds by 2015.¹ World highbush blueberry acreage grew from approximately 50,000 acres in 1995 to over 190,000 acres in 2010.² North American highbush blueberry acreage increased by over 55 percent from 71,075 acres in 2005 to 110,290 acres in 2010.³

With highbush blueberry production expected to increase more than 38 percent by 2015, the USHBC hopes to increase consumption among existing blueberry consumers and to attract new blueberry users. Per capita consumption of blueberries increased from 15.7 ounces in 2000 to 31.4 ounces in 2009.⁴ According to the North American Blueberry Council, U.S. per capita consumption is now estimated at 36.2 ounces. In order to maintain a balance between supply and demand, a 38 percent increase in per capita consumption would equate to a level of 50 ounces per person by 2015.

1 Brazelton, C., World Blueberry Acreage & Production, 2011, Brazelton Ag Consulting, p. 49.

2 Brazelton, World Blueberry Acreage & Production, p. 43.

3 Brazelton, World Blueberry Acreage & Production, p. 42.

4 Kaiser, Henry M., An Economic Analysis of Domestic Market Impacts of the U.S. Highbush Blueberry Council, 2010, Cornell University, p. 3.

At the \$18 per ton assessment rate and assessable tonnage ranging from 350,000 to 500,000 tons (700 million to 1 billion pounds), assessment income could range from \$6.3 million to \$9 million annually. As an example, if 15 percent of the budget was allocated to health and nutrition research and 60 percent were allocated to promotion, funds available for health and nutrition research could range from \$945,000 to \$1.35 million annually and funds available for health messaging and promotion could range from \$3.78 million to \$5.4 million annually.

In light of the need to allocate more funds towards health research activities and continue to build demand for blueberries, the USHBC recommended increasing the assessment rate under the Order from \$12 to \$18 per ton (or by \$0.003 per pound). Section 1218.52(c) of the Order is amended accordingly. Changes are also made to section 1218.52(d)(2) to update the listed Harmonized Tariff Schedule of the United States (HTSUS) numbers; this change is administrative in nature and has no impact on the assessment rate.

Final Regulatory Flexibility Act Analysis

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), AMS is required to examine the impact of this rule on small entities. Accordingly, AMS has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened. The Small Business Administration defines, in 13 CFR Part 121, small agricultural producers as those having annual receipts of no more than \$750,000 and small agricultural service firms (first handlers and importers) as those having annual receipts of no more than \$7.0 million.

There are approximately 2,000 domestic producers, 78 first handlers and 194 importers of highbush blueberries covered under the program. Dividing the highbush blueberry crop value for 2012 reported by the National Agricultural Statistics Service (NASS) of \$781,808,000⁵ by the number of producers (2,000) yields an average annual producer revenue estimate of \$390,904. It is estimated that in 2012, about 68 percent of the first handlers shipped under \$7 million worth of highbush blueberries. Based on 2012 Customs data, it is estimated that 90 percent of the importers shipped under \$7 million worth of highbush blueberries. Based on the foregoing, the majority of producers, first handlers and importers may be classified as small entities.

⁵ Noncitrus Fruits and Nuts 2012 Summary, January 2013, USDA, National Agricultural Statistics Service, p. 10.

Regarding value of the commodity, as mentioned above, based on 2012 NASS data, the value of the domestic highbush blueberry crop was about \$782 million. According to Customs data, the value of 2012 imports was about \$515 million.

This rule amends section 1218.52(c) of the Order to increase the assessment rate from \$12 to \$18 per ton (an increase of \$0.003 per pound). The Order is administered by the USHBC with oversight by USDA. Under the program, assessments are collected from domestic producers and importers and used for research and promotion projects designed to maintain and expand the market for highbush blueberries in the United States and abroad. Additional funds will enable the USHBC to expand its health research activities and promotional efforts. The USHBC uses its health information in its promotion messaging to help build demand. Increasing demand will help move the growing supply of blueberries, which will benefit producers and consumers. This rule also updates the HTSUS numbers listed in section 1218.52(d)(2). Authority for this action is provided in section 1218.52(c) of the Order and section 517 of the 1996 Act.

Regarding the economic impact of this rule on affected entities, this action increases the assessment obligation on domestic producers and importers. While assessments impose additional costs on producers and importers, the costs are

minimal and uniform on all. The costs are also offset by the benefits derived from the operation of the program. It is estimated that 1,857 producers and 173 importers pay assessments under the program.

There have been two economic studies conducted since the Order's inception that evaluated the effectiveness of the USHBC's promotion program. The studies were conducted by Dr. Harry M. Kaiser at Cornell University in 2005 and 2010 and are both titled "An Economic Analysis of Domestic Market Implications of the U.S. Highbush Blueberry Council." These studies may be obtained from Maureen Pello at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section. The 2005 study evaluated the program from 2001-2004 and the 2010 study evaluated the program from 2001-2009. The purpose of the research was twofold: (1) To determine the domestic market implications of the USHBC's promotion program and (2) to complete a benefit-cost ratio (rate of return) for the promotion activities conducted by the USHBC. The impact of the USHBC's export marketing activities was not evaluated because most of the USHBC's marketing budget has been invested in the United States (about 90 percent).

To assess the impact of the USHBC's domestic promotion activities on blueberry sales (a measure of demand), an

econometric demand model was developed for blueberry sales in the United States. The model allowed the impact of the USHBC's generic promotion activities to be estimated while taking into account the impact of other factors that influence demand. These other factors include the price of blueberries, the price of blueberry substitutes, population, and consumer taste and preferences.⁶ The research shows that the USHBC's promotion activities increased total blueberry sales by 441 million pounds in total, or 49 million pounds per year from 2001 through 2009. This represents an annual increase in blueberry sales of 12.3 percent. Thus, the promotional spending by the USHBC has a positive effect on domestic highbush blueberry demand.

The results also indicate that generic blueberry promotion by the USHBC has had a positive impact on the blueberry producers' price. Specifically, from 2001 to 2009, the average increase in price ranged from 14 cents per pound in the case of the least elastic supply response to 5 cents per pound in the case of the most elastic supply response.⁷ The average impact over all supply responses was 8.4 cents per pound. In other words, had there been no generic blueberry promotion by the USHBC, the average producers' price would have been 8.4 cents

⁶ The econometric model used statistical methods with time series data to measure how strongly the various blueberry demand factors are correlated with sales in the United States.

⁷ Price elasticity of supply is a measure used in economics to show the responsiveness, or elasticity, of the quantity supplied/produced of a good or service to a change in price. When the coefficient is less than one, the supply can be described as inelastic. When the coefficient is greater than one, the supply can be described as elastic.

per pound, or 7.2 percent lower than it was from 2001 through 2009.

The studies also show that USHBC promotion efforts have had a positive impact on producer surplus (i.e., producer profits) from 2001 through 2009. The average increase in producer surplus due to generic blueberry promotion by the USHBC ranged from \$5.4 million per year, in the case of the least elastic supply response, to \$1.9 million per year, in the case of the most elastic supply response. The average increase in producer surplus over all supply responses was \$3.2 million per year. Thus, the studies concluded that the domestic promotion efforts of the USHBC have had a positive impact on producer profits since 2001.

An average benefit-cost ratio (BCR) for the USHBC's generic promotion activities was also computed. The BCR measures the net benefits of the program, which is equal to the gain in producer surplus divided by the cost of the marketing program. The BCR exceeded 1.0 for every supply response considered in Dr. Kaiser's study.⁸ For the least elastic supply response, the average BCR was 15.41. This implies that, on average from 2001-2009, the benefits of the USHBC promotion program has been over 15 times greater than the costs. At the opposite end of the

⁸ Kaiser, An Economic Analysis, 2010, p. 24.

spectrum in the supply response, the average BCR was computed to be 5.36, implying that the benefits of the USHBC were over five times greater than the costs. Given the wide range of supply responses considered in the analysis, and the fact that the BCR was above 1.0 in all cases, there is significant evidence that the USHBC's promotion programs have been profitable for the domestic blueberry industry. The average BCR over all supply responses was 9.12 (i.e., the benefits of the promotion activities of the USHBC exceeded the costs by nine-fold).

To calculate the percentage of producer revenue represented by the assessment rate, the \$18 per ton (\$0.009 per pound) assessment rate is divided by the average producer price. According to the NASS, the average producer price ranged from \$1.85 per pound in 2011 (\$2.14 per pound for fresh and \$1.28 per pound for processed) to \$1.69 per pound in 2012 (\$2.19 per pound for fresh and \$0.923 per pound for processed).⁹ Thus, the assessment rate as a percentage of producer price could range from 0.486 to 0.532 percent (or from 0.420 to 0.411 percent for fresh and from 0.703 to 0.975 percent for processed).

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements that are imposed by the Order have been approved

⁹ Noncitrus Fruits and Nuts, p. 35.

previously under OMB control number 0581-0093. This rule does not change the information collection and recordkeeping requirements previously approved and imposes no additional reporting and recordkeeping burden on blueberry producers, first handlers and importers.

As with all Federal promotion programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. Finally, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Regarding alternatives, the USHBC has been considering an increase in the assessment rate for the past few years. The USHBC reviewed rates ranging from maintaining the status quo at \$12 per ton to doubling the rate to \$24 per ton. In 2009, the USHBC recommended increasing the rate to \$24 per ton. Two members opposed the increase because a rate of \$18 per ton had been discussed at previous meetings and communicated to producers. USDA published a proposed rule for public comment in

July 2009 (74 FR 36955; July 27, 2009) and ultimately withdrew the proposed rule in February 2010 based on the comments received (75 FR 7985; February 23, 2010).

Since that time, the USHBC and its committees have continued to discuss the need to increase the assessment rate. USHBC representatives have met with various producer associations and discussed this issue with their members as well as with importers. Ultimately the USHBC unanimously recommended increasing the rate to \$18 per ton at its October 2012 meeting.

A proposed rule concerning this action was published in the **Federal Register** on May 20, 2013 (78 FR 29258). USDA mailed copies of the rule to all known highbush blueberry producers and importers of record. The USHBC included notifications about the proposed rule in its newsletters and also mailed related information to producers and importers. Finally, the proposal was made available through the Internet by USDA and the Office of the Federal Register. A 60-day comment period ending July 19, 2013, was provided to allow interested persons to submit comments.

Analysis of Comments

One hundred and sixty eight comments were received in response to the proposed rule; 137 supported the increase (119 were a form letter), 29 were opposed and 2 commented without

taking a position on the action. The comments are addressed in the following paragraphs.

Comments in Support

The 137 comments which supported increasing the assessment rate stated that additional funds would allow the USHBC to expand its promotion and health research efforts at a time when supplies are dramatically increasing. According to the commenters, North American highbush blueberry acreage has increased from 71,075 acres in 2005 to about 123,635 acres in 2012, a 74 percent increase in seven years. Newly planted acres and enhancement of existing acres has led to successive records in North American highbush blueberry production, which was about 589 million pounds in 2012, a 93 percent increase over the estimated 305 million pounds produced in 2005. Production could reach 735 million pounds by 2015. The commenters stated that, with the increase in supply, there is a need to significantly increase domestic per capita consumption from its current level of about 36 ounces per person to a projected 50 ounces per person, a 38 percent increase.

The commenters stated that additional funds would allow the USHBC to expand its health research efforts and move to more extensive human clinical trials. Funds would also allow for continued education about blueberries and to elevate awareness

and maintain consumer confidence. One commenter supported doubling the assessment rate.

Comments Opposed

Twenty-nine comments received were opposed to increasing the assessment rate. Eleven commenters argued that increasing the assessment rate is not needed because the increase in blueberry supply will automatically bring additional funds to the USHBC to support its activities. USDA concurs that the current assessment rate of \$12 per ton on the level of production over the next few years will increase USHBC income. At the \$12 per ton rate and assessable tonnage ranging from 350,000 to 500,000 tons (700 million to 1 billion pounds), assessment income would range from \$4.2 million to \$6 million annually. While higher assessable volumes compute to more USHBC income, maintaining the \$12 per assessment rate will not generate the amount of money necessary to fund expensive human clinical trials and conduct promotion activities needed to continue to build demand to move the growing supply of blueberries.

Three commenters argued that a better use of assessment funds would be to study challenges like the spotted wing drosophila (SWD) and other industry problems. While the majority of USHBC funds are used for health research and

promotion, the USHBC does invest in other areas. For example, the USHBC's Good Practices Committee is tasked with educating growers and handlers about best practices regarding food production and is reviewing issues like the SWD. In an effort to explore cost savings measures for the industry, the USHBC recently funded a research project related to the mechanical harvesting of blueberries. Thus, the USHBC does address other issues, provided they are within the scope of the Order's authority.

Four commenters argued that an assessment rate increase would hurt small growers. One commenter recommended that the rate be increased only for large growers, as an example, the top 10 percent by acreage or something similar. Section 1218.53(a) of the Order in fact provides that small growers who produce less than 2,000 pounds of blueberries annually are exempt from the payment of assessments. USDA reviewed data for the top 10 percent of growers by acreage and concluded that not enough assessment income would be generated for the USHBC to fund expanded human clinical trials and conduct promotion activities needed to build demand and move the growing supply of blueberries. While the increased assessment rate will impose an additional cost on growers, it is estimated to be less than 1 percent of the producer price.

Additionally, the two economic studies by Dr. Kaiser cited earlier in this rule have indicated that generic blueberry promotion by the USHBC has had a positive impact on producer prices. Specifically, had there been no generic blueberry promotion by the USHBC, the average producers' price would have been 8.4 cents per pound, or 7.2 percent lower than it was from 2001 through 2009.

One commenter expressed concern that the USHBC spends most of its promotion funds on the prepared foods industry, baking, catering, restaurant services where blueberry alternatives are accepted practices due to a lack of demand and education of the consumer. The USHBC allocates funds to several promotion areas. In 2013, the USHBC budgeted \$2.505 million for market promotion and publicity. Of that \$2.505 million, \$1.67 million (or almost 67 percent) is for consumer/food service publicity, \$400,000 is for food manufacturing publicity, and \$325,000 is for export market promotion. Thus, a significant portion of the USHBC's program targets consumers.

Two commenters expressed concern that the USHBC does not actively promote U.S. grown blueberries but rather blueberries in general. Some commenters also argued that U.S. growers are unfairly assessed for the promotion of poor quality imports. Under the Order, U.S. growers as well as importers of highbush

blueberries must pay assessments. Over one-third of the USHBC's assessments are derived from imports. Thus, with both U.S. growers and importers paying into the program, promotion campaigns must be designed to benefit all blueberries.

One commenter argued that the USHBC is a bureaucracy that should be cut and that it gouges the U.S. tax payer and growers. Another commenter also expressed concern about costs associated with USHBC meetings. Research and promotion programs overseen by USDA are self-help programs funded by their respective industries and do not receive taxpayer funds. While the increased assessment rate will impose an additional cost on growers, it is estimated to be less than 1 percent of the producer price.

Regarding USHBC meetings, the USHBC holds two meetings per year, one in a blueberry producing area which allows industry members across the country to attend the meeting and the second whenever possible near an airport hub to limit travel costs. Travel costs are considered administrative and section 1218.50(i) of the Order limits administrative costs to 15 percent of a fiscal year's available income. In 2012, the USHBC's administrative costs were 7.46 percent of available income, much lower than the Order's threshold.

No changes have been made to the proposed rule based on these opposing comments.

Other Comments

Two comments were received that did not take a position on the proposed assessment rate increase. One commenter stated that she supports promoting blueberries. Another commenter asked about the amount of funds used for administration versus promotion, hoping that at least 75 percent of the funds are used for promotion, research and information projects. As previously mentioned, section 1218.50(i) limits the funds that the USHBC can spend for administration to 15 percent of available income for the year. In 2012, the USHBC's administrative costs were 7.46 percent of available income, much lower than the Order's threshold. USHBC 2012 actual program expenses were almost 80 percent of its total expenditures.

After consideration of all relevant matters presented, including the information and recommendation submitted by the USHBC and other available information, it is hereby found that this rule, as hereinafter set forth, is consistent with and would effectuate the purposes of the 1996 Act.

List of Subjects in 7 CFR Part 1218

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Blueberry promotion, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, Part 1218, Chapter XI of Title 7 is amended as follows:

PART 1218 — BLUEBERRY PROMOTION, RESEARCH, AND INFORMATION ORDER

1. The authority citation for 7 CFR part 1218 continues to read as follows:

Authority: 7 U.S.C. 7411-7425; 7 U.S.C. 7401.

2. In § 1218.52, paragraph (c) and the first sentence of paragraph (d)(2) are revised to read as follows:

§ 1218.52 Assessments.

* * * * *

(c) Such assessments shall be levied at a rate of \$18 per ton (or \$0.01984 per kg) on all blueberries. The assessment rate will be reviewed, and may be modified with the approval of the Secretary.

(d) * * *

(2) The import assessment shall be uniformly applied to imported fresh and frozen blueberries that are identified by the numbers 0810.40.0029 and 0811.90.2028, respectively, in the Harmonized Tariff Schedule of the United States or any other numbers used to identify fresh and frozen blueberries. * * *

* * * * *

Dated: September 24, 2013

Rex A. Barnes
Associate Administrator

[FR Doc. 2013-23695 Filed 09/27/2013 at 8:45 am; Publication
Date: 09/30/2013]